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No. 91-1152

In the Supreme Court of the United States

OCTOBER TERM, 1991

PUBLIC UTILITY DISTRICT NO. 1 OF DOUGLAS COUNTY, WASHINGTON, PETITIONER

v.

BONNEVILLE POWER ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Pacific Northwest Electric Power Planning and Conservation Act directs the Bonneville Power Administration (BPA) to compensate non-federal power projects for losses resulting from "measures to protect, mitigate, and enhance fish and wildlife" that are "impose[d]" on the projects by BPA or other federal agencies. 16 U.S.C. 839b(h)(11)(A)(ii). The question presented is:

Whether BPA reasonably interpreted the term "impose" to mean affirmative conduct by the non-federal power projects that is required by federal law, regulation, or order.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 947 F.2d 386.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 1991. The petition for a writ of certiorari was filed on January 15, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Bonneville Power Administration (BPA), a self-financed agency within the Department of Energy, markets power from 30 federal hydroelectric

projects and two nuclear power plants in the Pacific Northwest. The Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. 839-839h, commonly known as the Northwest Power Act, is one of four organic statutes governing the functions of BPA. Section 4(h)(11)(A)(ii) of the Northwest Power Act obligates BPA, under certain circumstances, to reimburse nonfederal electric power projects for losses resulting from "measures to protect, mitigate, and enhance fish and wildlife" that are "impose[d]" on the projects by other federal agencies. 16 U.S.C. 839b(h)(11)(A)(ii).

In 1987, the Army Corps of Engineers released water in excess of its water budget from reservoirs along the Columbia River to augment flows and assist juvenile Snake River fish through the lower Columbia River. Three mid-Columbia Public Utility Districts (PUDs) subsequently filed the first compensation claims under 16 U.S.C. 839b(h)(11)(A)(ii), for losses incurred when the Corps released the additional water. After BPA settled those claims—and after notice and comment rulemaking—it adopted a policy to govern future claims. See 54 Fed. Reg. 31,074 (1989) (Pet. App. 22a-28a). The compensation policy defines "[i]mpose" or "[i]mposition" to "refer[] to the act of applying fish and wildlife obligations or restrictions upon a claimant which the claimant must implement in order to comply with applicable Federal law, regulation, or order." Pet. App. 26a. The policy also establishes other requirements and procedures for filing claims. *Id.* at 27a-28a.

2. Petitioner Public Utility District (PUD) No. 1 of Douglas County, Washington, owns and operates a non-federal hydroelectric project on the Columbia River. Together with two other PUDs, petitioner

brought this action in the Ninth Circuit under 16 U.S.C. 839f(e)(5)[1] to challenge elements of the compensation policy. It argued, *inter alia*, that the policy's definition of the term "impose" in 16 U.S.C. 839b(h)(11)(A)(ii) does not comport with the Northwest Power Act. Pet. App. 4a, 17a.[2]

The court of appeals sustained BPA's interpretation of the term "impose." Pet. App. 9a-17a. Although the PUDs argued that the term "includes within its ambit those actions which impose upon the non-federal projects passive burdens * * * such as the release of additional water," *id.* at 9a-10a, the court found BPA's definition to be "entirely reasonable in terms of [the Northwest Power Act] because it recognizes [an] important difference between the two paragraphs in section 839b(h)(11)(A)." *Id.* at 12a. Thus, the court noted that paragraph (ii) of Section 839b(h)(11)(A), which is concerned with actions that federal agencies require non-federal projects to take, obligates BPA to bear certain costs or losses incurred by the non-federal projects, while paragraph (i), which addresses actions that the federal agencies themselves might take, contains no such

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[1] The Ninth Circuit has exclusive jurisdiction to review final actions taken by BPA pursuant to the Northwest Power Act. 16 U.S.C. 839f(e)(5); *CP Nat'l Corp.* v. *Jura*, 876 F.2d 745, 748 (9th Cir. 1989); *Forelaws on Board* v. *Johnson*, 709 F.2d 1310, 1311-1313 (9th Cir. 1983).

[2] Petitioner and the other two PUDs also challenged BPA's definition of "measures" in 16 U.S.C. 839b(h)(11)(A)(ii). The court of appeals agreed with petitioner's position, Pet. App. 6a-9a, and we do not seek review of that ruling. The court of appeals also rejected challenges to five claim requirements and procedures and found a sixth not ripe for judicial review. *Id.* at 17a-20a. Petitioner does not challenge those rulings.

obligation. Against this background, the court concluded (Pet. App. 12a):

> It is our view that any losses to a nonfederal project as a result of direct action by a federal agency such as the Corps under paragraph (i) is not compensable because that paragraph does not require compensation. Federal action under paragraph (ii), on the other hand, contemplates the imposition of a measure on the non-federal hydroelectric project. The project must then itself carry out the measure to protect, mitigate, and enhance fish and wildlife, and the Administrator must compensate the project.

Noting that several agencies, including the Federal Energy Regulatory Commission (FERC), may require or direct a non-federal electric power project to take affirmative action to preserve fish and wildlife, the court held that "BPA's interpretation of 'impose' in 16 U.S.C. 839b(h)(11)(A)(ii) to include only the affirmative conduct required of non-federal utilities by federal agencies is not inconsistent with the language of the statute, and is therefore reasonable." Pet. App. 17a.[3]

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[3] Judge Thompson dissented. Pet. App. 20a-21a. He acknowledged that the statutory text provides "some support" for BPA's interpretation of "impose." *Id.* at 20a. However, he believed that FERC is the only federal agency authorized to require non-federal projects to take affirmative action, and that because the Northwest Power Act "expressly contemplates that several agencies can impose compensable measures," Congress could not have meant that compensation is due only when affirmative conduct is required. *Id.* at 21a.

ARGUMENT

The Ninth Circuit correctly construed the Northwest Power Act in accordance with general principles of statutory interpretation announced by this Court and found BPA's definition of the term "impose" to be consistent with the statutory text. The Ninth Circuit's interpretation of that particular provision of the Northwest Power Act does not conflict with the decision of any other court of appeals or raise any question of general importance warranting review by this Court.

1. Petitioner erroneously contends (Pet. 23-29) that the court of appeals inappropriately deferred to BPA's construction of the statutory compensation provision because BPA "has a direct and substantial financial interest in the scope of the compensation provision of section 4(h)(11)(A)" (Pet. 23). Petitioner also contends that the court of appeals' standard of review conflicts with the standard followed by the D.C. Circuit. Pet. 24. Each submission lacks merit.

a. Petitioner's argument that the court below should not have deferred to BPA's interpretation is refuted by this Court's prior holding that "[u]nder established administrative law principles, it is clear that the [BPA] Administrator's interpretation of the [Northwest Power] Act is to be given great weight." *Aluminum Co. of America* v. *Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 389 (1984); see also *California Energy Comm'n* v. *Bonneville Power Admin.*, 909 F.2d 1298, 1306 (9th Cir. 1990), cert. denied, 111 S. Ct. 1682 (1991). That principle "has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understand-

ing of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

In addition, petitioner overstates the nature and extent of BPA's financial interest in the compensation policy. BPA is a self-financed agency that receives its revenues from rates charged for sales of power and for power-marketing services. 16 U.S.C. 832f, 838g, 838h. BPA does not make a profit. Its financial interest therefore is limited to maintaining "the lowest possible rates to consumers consistent with sound business principles." 16 U.S.C. 838g(1). As a result, BPA's interest in the scope of the compensation provision does not differ from its interest in the administration of other provisions of the Northwest Power Act. Indeed, this Court was specifically informed of BPA's far more substantial financial interest in the statutory question at issue in *Central Lincoln* (see Gov't Br. 19), yet it accorded BPA's interpretation of the Act great weight. 467 U.S. at 389.

The logic of petitioner's contrary argument would call into question the established scope of judicial review of not only the actions of BPA, but also those of any agency that disburses funds. Yet the Court has never suggested, for example, that the obligations of the Secretary of Health and Human Services to protect the trust funds established under the Social Security Act give him the sort of financial interest in the administration of the Social Security Act that might deprive his interpretations of the Act of the deference customarily accorded to administrative interpretations. See, *e.g.*, *Sullivan* v. *Zebley*, 493 U.S.

521, 528 (1990) (applying *Chevron* standard and holding that regulations under Social Security Act "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute").

b. Petitioner errs in relying (Pet. 24) on *National Fuel Gas Supply Corp.* v. *FERC*, 811 F.2d 1563 (D.C. Cir.), cert. denied, 484 U.S. 869 (1987), for the proposition that an "interested" agency's decision is entitled to little, if any, deference. There, the D.C. Circuit discussed at length why it was proper to defer to FERC's interpretation of a settlement that had been agreed to by the plaintiff company and its customers and had been approved by FERC. 811 F.2d at 1568-1571. The D.C. Circuit simply noted in dictum that if the agency had been an interested party to the agreement, "deference might lead a court to endorse self-serving views that an agency might offer in a post hoc reinterpretation of its contract." *Id.* at 1571.

National Fuel does not represent an actual holding that no deference should be given to an administrative determination even where the agency is "interested" in the matter in some legally relevant sense. Moreover, the present case does not involve BPA's interpretation of a contract to which it is a party (the hypothetical situation described in *National Fuel*); it instead involves the interpretation of a complex statute by the agency charged with its administration—the precise situation in which courts have traditionally applied a highly deferential standard of review.[4] For this reason, the court of appeals

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[4] See *Massachusetts* v. *Morash*, 490 U.S. 107, 114-118 (1989); *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 292-293 (1988); *EEOC* v. *Commercial Office Prods. Co.*, 486 U.S. 107,

here had no occasion to—and did not—either approve or reject the *National Fuel* dictum on which petitioner relies.

2. In any event, the court of appeals' decision upholding BPA's interpretation had ample support apart from the degree of deference articulated by the court. The court subjected BPA's compensation policy to exacting review, which led it to *reject* one element of BPA's compensation policy (see note 2, *supra*), while finding others consistent with the statute. Reading Section 839b(h)(11)(A) as a whole, the court of appeals found BPA's interpretation of "impose" to be entirely reasonable, because it recognizes an important distinction (explicit in the statutory text) between affirmative actions that federal agencies may require non-federal projects to take to preserve fish and wildlife, and actions that agencies may themselves take for that reason. Pet. App. 12a. Thus, rather than producing an absurd result, as petitioner contends (Pet. 18), BPA's interpretation produces the result required by 16 U.S.C. 839b(h)(11)(A)(ii): that BPA will compensate non-federal projects for measures they are directed by federal agencies to take. Petitioner in effect concedes the reasonableness of BPA's interpretation by resorting to speculation that the location of the compensation provision in the Act—which strongly reinforces BPA's interpretation—is the result of a "printing error" (Pet. 21) and occurred for "some unexplained reason" (Pet. 20).

114-116 (1988); *NLRB* v. *United Food & Commercial Workers Union Local 23*, 484 U.S. 112, 123-128 (1987); *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 845 (1986); *Chemical Mfrs. Ass'n* v. *Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125-126 (1985); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 700 (1984).

Furthermore, as BPA explained when it adopted the compensation policy, its interpretation of "impose" as referring to legal obligations incurred by the operator of a non-federal project is "consistent with the commonly understood definition of impose: 'To levy or exact as by authority; to lay as a burden, tax, duty or charge.'" Pet. App. 34a (quoting *Black's Law Dictionary* 680 (5th ed. 1979)). As BPA further explained, that interpretation also is supported by the legislative history, which refers to undertakings that a federal agency, such as FERC, might require of non-federal licensees or permitees for the protection and enhancement of fish and wildlife. See Pet. App. 34a-35a.

3. Finally, petitioner's passing attempt to cast BPA's interpretation of "impose" as an inverse condemnation issue (Pet. 16-17) entirely lacks merit. Petitioner failed to raise or argue that issue before the courts of appeals. Moreover, petitioner has failed to assert, and cannot here prove, a vested and legally enforceable water right. See generally *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 424 (1940); *United States* v. *Grand River Dam Auth.*, 363 U.S. 229, 232 (1960); *United States* v. *Twin City Power Co.*, 350 U.S. 222, 225-226 (1956).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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